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IN THE

Supreme Court of the United States

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF ANNEXED THERETO.

BEATRICE L. GOLDSTONE,
EUGENE L. BONDY,
Petitioners.

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BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Beatrice L. Goldstone and Eugene L. Bondy respectfully shows:

1. They are citizens of the State of New York.

2. As executors of the Will of the late Morris L. Goldstone, under administration in the Surrogate's Court of Westchester County, State of New York, they brought this suit against the United States of America to recover an alleged overpayment of estate taxes on their estate, assessed erroneously, as they assert, by the Commissioner of Internal Revenue.

3. The action was commenced by the service of a summons and complaint in the United States District Court, Southern District of New York, on March 27th, 1942. Issue was joined on June 2nd, 1942. Trial was had on March 17, 1943, before Hon. Stephen W. Brennan, District Judge,

who filed his opinion (Record, p. 20) on August 5th, 1943; whereupon judgment was entered on September 24, 1943 (Record, p. 29), dismissing the complaint on the merits.

Appeal was taken by the plaintiffs to the Circuit Court of Appeals for the Second Circuit on September 27th, 1943 (Record, p. 30). Briefs were filed and the cause was argued orally on May 26th, 1944. The judgment of the District Court was unanimously affirmed by an order of the Circuit Court of Appeals filed August 28th, 1944, upon a unanimous decision dated August 11, 1944.

4. These petitioners seek a writ directing that the record be certified to this honorable court for review on the ground that the judgment of the Circuit Court of Appeals necessarily implies, and the decision of that court clearly announces, a doctrine that perverts the fundamental basis for the taxation of decedents' estates. We will show briefly that the court below has disregarded the "passing of an economic benefit" as a ground for estate taxation and has substituted in its place a tax on a change in mere insubstantial legal theory. We believe this is at variance with the consistent pronouncements of the Supreme Court. We submit that the decision, if remaining uncorrected, will be a source of confusion as well as, in the case at bar, an injustice.

5. The facts are all stipulated (Record, pp. 10-13). The important Exhibits B and C, annexed to the fact stipulation, were not printed below. Photostatic copies were supplied the court by agreement (Record, pp. 17, 33). The same practice is being followed here at the suggestion of the Clerk of this Court.

6. The decedent died on February 23rd, 1938. On June 29, 1933, the Equitable Life Assurance Society of the United States issued two contracts. They were rewritten within two months but "without substantial change" (Rec-

ord, p. 12, pars. 7 and 8). Each contract was bought by a single premium, paid by check of the decedent. The decedent's wife became from the outset—not by transfer, but as a matter of original issue—the owner of both contracts, as will be shown below. Whether the payment of the single premium by decedent's check was a mere convenience, or whether his money actually paid the premium, seems to be unimportant since no claim is made of a transfer in contemplation of death. One contract insured the decedent's life; the other was an annuity. No physical examination of decedent was required.

7. The wife survived the decedent.

8. The following are the essential characteristics common to both contracts:

(a) The wife is originally named as owner ("Purchaser" in the annuity contract No. 9,168,544; "Owner" in the insurance contract No. 9,168,545); and that designation was never changed.

(b) The wife might, without the consent of the decedent, indeed without any restraint whatever, surrender the contracts at any time and receive to her own unrestricted use the proceeds (in the case of the annuity contract the full death benefit [No. 9,168,544, middle of first page]; in the case of the insurance contract, the surrender value); or she might freely pledge or assign them or either of them or, subject only to the approval of the Equitable, change the form of contract (No. 9,168,544 at pp. 1, 2; No. 9,168,545 at pp. 4, 5).

(c) The wife might unrestrictly change the beneficiary (No. 9,168,544 at p. 3; No. 9,168,545 at p. 4).

(d) Free of restraint, she might capture the dividends and borrow on the security of the contracts (No. 9,168,544 at p. 3; No. 9,168,545 at pp. 3 and 5).

(e) When the life policy became an endowment, she might collect to her own use the amount thereof (No. 9,168,545 at p. 3).

(f) She might without restriction elect a mode of settlement (No. 9,168,544 at p. 5; No. 9,168,545, rider).

(g) *The decedent and all other persons are specifically excluded from all rights in the contracts,* if the wife exercised her privilege of assigning them (No. 9,168,544 at p. 2; No. 9,168,545 at p. 4).

(h) *Only if the wife should not have surrendered or assigned the contracts* would ownership of them pass (not revert, for he never owned them) to the decedent upon the wife's dying before him (No. 9,168,544 at p. 2; No. 9,168,545 at pp. 2, 4).

9. Thus the husband-decedent had no right in *praesenti* or *in futuro* in either contract; no possibility of reverter, for he never owned them, hence had never parted with them; no expectancy that did not depend on the free grace of his wife. If she chose not to assign or surrender the contracts he might entertain a hope of one day possessing them as her survivor, very much as a beneficiary named in a will might during the testator's lifetime hope for a legacy if the testator should not revoke.

10. The decedent did not retain "the right to the income from the property" (I. R. C. sec. 811 (c)) since all income from the insurance policy belonged to the wife and the annuity contract sharply separated the death benefit (which the wife might capture at any time during the husband's life—see middle of p. 1 of No. 9,168,544) from the fund that yielded him an annuity.

11. For all these reason we urge that the doctrine of *Helvering* v. *Hallock* (309 U. S. 106) does not apply; that there was not only no property passing from the husband

on his death, but that, on the contrary, had the wife died first the contracts, if unimpaired, would have constituted gross assets of her estate (*Chase National Bank* v. *United States*, 278 U. S. 327; Stone, J., at top of p. 335).

12. It is submitted that the last paragraph of the opinion of Swan, Circuit Judge, in writing for affirmance of the judgment in the case at bar, announces an erroneous and dangerous doctrine which this court should correct. He recognizes that the wife might have realized, without hindrance, substantially the same amount during her husband's lifetime as she took after his death. His death brought no substantial increase in her "economic benefits". But, says the court (italics not in original):

> "No part of the proceeds which the wife received came to her *through the exercise of her powers under the contracts.* At the moment of her husband's death the powers expired and became a nullity. * * * His death was the operative fact which matured the promisor's duty to pay 'and became the "generating source" of important and definite accessions to the property rights' of the wife."

If we read this aright, it proclaims that not the passing of an economic benefit but the change in the legal description of the benefit is the basis of estate taxation. We believe this is contrary to the doctrine uniformly sustained by this court.

A brief memorandum on the law is submitted, attached to this petition.

WHEREFORE these petitioners pray that a writ issue to the United States Circuit Court of Appeals for the Second Circuit directing the certification to this court of the record and all proceedings upon appeal in this action that the

same may be here reviewed and any errors corrected and that a writ of certiorari in proper manner may be granted.

November 21st, 1944.

Respectfully submitted,

Beatrice L. Goldstone

Eugene L. Bondy

Petitioners.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, having been duly sworn, depose as follows:

They are the petitioners in the foregoing petition. They have read the same and know the contents thereof. The allegations therein are true to their knowledge except as to assertions of opinion; and as to assertions of opinion, they believe them to be true and justified.

Beatrice L. Goldstone

Eugene L. Bondy

Sworn to before me this
21st day of November, 1944.

Helen Wasserman

Notary Public
N. Y. Co. No. 199, Reg. No. 109-W-5
Cert. Filed in Bronx Co. No. 3, Reg. No. 22-W-5
Cert. Filed in Kings Co. No. 11, Reg. No. 124-W-5
Commission Expires March 30, 1945

Supreme Court of the United States

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, Executors of the Estate of Morris L. Goldstone, deceased,

Petitioners,

against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Statement

The petitioners seek to review an order of the Circuit Court of Appeals for the Second Circuit affirming by unanimous vote a judgment of the United States District Court for the Southern District of New York which dismissed the plaintiffs' complaint on the merits.

The chronology of the proceeding is set forth in paragraph 3 of the petition.

The plaintiffs, as executors, paid to the Collector of Internal Revenue a tax of $123,602.90 on the estate of the decedent, of which $5,376.11 was paid on December 4, 1940 under protest. A claim for refund was duly filed (Rec. p. 11) and was rejected (Rec. p. 13). It is to recover this latter payment that the suit was brought.

Plaintiff's Contention

These petitioners, as plaintiffs, urged that the Commissioner erred in including in the gross estate of the decedent

the proceeds of two contracts issued by Equitable Life Assurance Society of America and more particularly described in the petition. The basis of their argument was (a) that the decedent had never owned either contract; (b) that his wife who survived him had been the absolute owner of both contracts from their origin; (c) that as the absolute owner of those contracts she might at any time during the life of the decedent have utterly destroyed them by surrendering them and taking to her own use their avails without requiring the concurrence or consent of the decedent or of anyone else and that at all times she possessed the unrestricted subsidiary rights of pledging the contracts, borrowing on their security, assigning them, changing the beneficiaries and, subject to the rules of Equitable Life Assurance Society, changing the forms of the contracts, etc.; (d) by the terms of the contracts, only if she died before the decedent without having exercised her rights to capture the proceeds of the contracts would any property therein vest (not revest) in the decedent; and (e) that, by the specific provision of the contracts, an assignment of either of them by her would grant an interest superior to any rights which might later accrue to anyone but the assignee.

Citations to the pages of the contracts substantiating these various characteristics are set forth in the petition. Photostatic copies of the contracts are supplied at the suggestion of the clerk of this court since, by stipulation below, the contracts were not printed at length in the record but copies thereof handed to the judges at the oral argument.

These petitioners pointed out before the Circuit Court of Appeals that an instant before the death of the decedent, the wife, by her free and untrammeled surrender of the annuity contract, could have received from the Equitable the precise amount which was payable to her as beneficiary after death (Annuity contract No. 9,168,544, middle of first page); and that at the same time or, at any time before her

husband's death, she could have collected, beyond the power of anyone to hinder her, the total surrender value of the insurance contract (No. 9,168,545).

Both contracts were written at the same time, almost five years before the decedent's death. No physical examination was required and they therefore probably cannot be technically considered insurance (*Helvering* v. *Le Gierse*, 312 U. S. 531); but no question arises, we think, which would make this fact significant since the death of the decedent occurred before the 1942 Amendment of I.R.C. 811, subdivision (g).

The Circuit Court of Appeals, in its opinion (144 Fed. [2d] 373), recognized all of the foregoing but thought that it was still compelled by *Helvering* v. *Hallock*, 309 U. S. 106, to consider these proceeds part of the decedent's gross estate (Swan, J., at p. 374). That court had already extended the holding in the *Hallock* case, which was concerned with possibilities of reverter in *inter vivos* trusts, to life insurance policies (*Chase National Bank* v. *United States*, 116 Fed. [2d] 625). Congress has provided otherwise in the meanwhile by the 1942 Amendment of I.R.C. 811 (g). Starting from its own holding in the *Chase* case as a point of departure, Judge Swan, while recognizing that neither the life tenant in the *Hallock* case nor the beneficiary in the *Chase National Bank* case would have had the power here enjoyed by the wife of totally blotting out the contracts during the life of the Hallock life tenant or the beneficiary in the *Chase* case, nevertheless thought that these distinguishing features should have no effect upon the result. Thus Judge Swan at page 375:

> "* * * It is true that none of the beneficiaries there had powers like those conferred upon the wife here. By surrendering the annuity contract at any time she could have gotten the same sum as though the annuitant had died; and by surrendering the life policy she could have obtained its surrender value, which at the instant before the insured's death was only $5,072.71 less than

> the amount payable to her upon his death. It is argued that the wife should be regarded as unconditional owner of the contracts, or at least of so much of the proceeds as she might have drawn at will under them. But the argument does not convince us."

And following this the Court clearly sets forth the reasons which we paraphrase to be that any property which the recipient had in as good title before the death of the decedent as afterwards is nevertheless a part of the decedent's gross estate *if only the theory by which it is acquired is altered at the death.* Thus, at page 375:

> "* * * No part of the proceeds which the wife received came to her through the exercise of her powers under the contracts. At the moment of her husband's death the powers expired and became a nullity. Cf. Johnson v. Snyder, 82 Ind. App. 215, 142 N. E. 877; Leaming v. Huffman, 96 N. J. Eq. 249, 124 A. 704; Supreme Colony United Order of Pilgrim Fathers v. Towne, 87 Conn. 644, 89 A. 264, Ann. Cas. 1916B, 181. His death was the operative fact which matured the promisor's duty to pay 'and became the "generating source" of important and definite accessions to the property rights of the wife. * * *"

We submit that this is in conflict with the uniform holding of this court that taxation of estates is a practical matter having to do with realities and concerned with the passing of economic value rather than with fine-spun theories by which the economic benefits may be described.

Very briefly, and with no attempt at argument, we point to our references to the law:

Law

A.

Where no ownership in property resides in the decedent at the time of his death, it cannot be considered in computing his gross estate.

May v. *Heiner*, 281 U. S. 238;
Shukert v. *Allen*, 273 U. S. 545.

B.

This applies as well to insurance contracts. Where no power of realization remains with the decedent, the proceeds of the policy are no part of his gross estate.

Bingham v. *United States*, 296 U. S. 211.

C.

On the contrary he is the owner of the policy who has the power to surrender and cancel it.

Chase National Bank v. *United States*, 278 U. S. 327.

There the present Chief Justice wrote at page 335:

> "A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. ed. 920), 46 L. R. A. (N. S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14, Consol. Laws Sec. 52; Kittel v. Domeyer, 175 N. Y. 205, 67 N. E. 433; Guardian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership. * * *"

D.

The wife, then, who survived the decedent, having at all times been the absolute owner of the economic benefit, it formed no part of his gross estate merely because his death

permitted her to take as beneficiary what, both before and after his death, she might have taken by reason of her contract rights without let or hindrance.

Thus, in *Tyler* v. *United States*, 281 U. S. 497, Mr. Justice Sutherland wrote at page 503:

> "Taxation, as it many times has been said, is eminently practical, and a practical mind considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights in respect to the property, theretofore never enjoyed by such survivor."

The Court there had before it the taxability of an interest in property held by the entirety upon the death of one of the spouses. The property was taxable because only by the death the surviving spouse (p. 504)

> "* * * became entitled to the exclusive possession, use and enjoyment. * * *"

Here, of course, the same quality and quantity of title, no more and no less, was enjoyed before as after the death.

The constant need for holding the interpretation of the taxing statutes to realities, instead of to insubstantial legal concepts, is thus expressed by Mr. Justice Frankfurter in *Griffiths* v. *Helvering* (308 U. S. 355) at page 357:

> "We cannot too often reiterate that 'taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.' *Corliss* v. *Bowers*, 281 U. S. 376, 378, 74 L. ed. 916, 917, 50 S. Ct. 336. And it makes no difference that such 'command may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency."

Among numerous other expressions may be cited the following: Mr. Justice Stone at the end of p. 346 of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; at pp. 336, 338 and 339 of *Chase National Bank* v. *United States*, 278 U. S. 327 and at p. 271 *Saltonstall* v. *Saltonstall*, 276 U. S. 260; Mr. Justice Sutherland at p. 503 of *Tyler* v. *United States*, 281 U. S. 497 and at p. 234 of *Klein* v. *United States*, 283 U. S. 231; Mr. Justice Frankfurter at p. 118 of *Helvering* v. *Hallock*, 309 U. S. 106.

We urge that the decision below offends by taxing the alteration of a legal theory rather than the shifting of an economical benefit.

Respectfully submitted,

BONDY & SCHLOSS,
Attorneys for Petitioner.

EUGENE L. BONDY,
of Counsel.